



U.S. Department
of Transportation

**Research and
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Administration**

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BY FACSIMILE

JAN 24 2001

Mr. Richard N. Siani
1211 16th Avenue
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Mr. Michael K. Law
8904 Walker Road
Longmont, CO 80503

Dear Messrs. Sinai and Law:

Thank you for your January 8, 2001 letter in which you ask me to expand on the guidance set forth in my August 12, 1999 letter to Mr. Dave W. Wergin of the University of Colorado (University). In that letter, I provided my opinion whether the Hazardous Materials Regulations (HMR), 49 C.F.R. Parts 171-180, apply to the transportation of hazardous waste in six scenarios presented by Mr. Wergin in accordance with the following general principles:

1. The HMR do not apply to the University as a carrier unless it transports hazardous material in commerce in furtherance of a commercial enterprise.
2. Transportation is not in furtherance of a commercial enterprise if it is carried out (a) by government personnel and (b) for a governmental purpose.
 - a. University employees are government personnel, but contractors are not.
 - b. The scope of governmental purpose is difficult to define in the abstract, but an activity is likely to fall within this domain when it is constitutionally mandated or authorized, when it is a traditional "sovereign" activity, when it falls within the government's police powers, or when its benefits accrue to the public as a whole.
3. Transportation that is entirely on private property and neither follows nor crosses a public way is not "in commerce," and therefore not subject to the requirements in the HMR. Property is regarded as private if public access is legally and actually restricted from the area where transportation occurs.

In your letter, you provide additional information with regard to the activities at the University which generate hazardous waste; the specific tasks performed by University and contractor personnel in loading, transporting, and unloading the hazardous waste; and the public's access to two specific routes over which you state that the hazardous waste is transported. You restate the six scenarios provided by Mr. Wergin, with additional assumptions regarding the personnel who load the hazardous waste and the routes followed, and ask for my opinion whether the HMR apply.

You state that some of the hazardous waste at the University is generated by professors in the course of their work on "personal commercial enterprises," but that this waste is not segregated from the hazardous waste that is generated in the course of teaching or University-sponsored research. In my earlier letter, I considered that the University was transporting its hazardous waste to a collection site as a part of its normal activities of running the University. Those normal activities could be viewed as providing certain support for the faculty members who are allowed to work on outside matters. In the same manner that a professor may use his or her office space, word processor, telephone and other University-supplied equipment and supplies, the normal activities of running the University may include collecting waste. Without more information, I conclude that the University has a governmental purpose in transporting all hazardous waste generated on the University campus, despite the fact that some of the waste may have been generated by professors working on "personal commercial enterprises."

You state that contractor personnel may assist University personnel in loading and unloading hazardous waste, but that only University employees actually drive vehicles that transport hazardous waste (consistent with scenarios 1 and 2). Therefore, the HMR would not apply to the hazardous waste when it is actually moving on the vehicle nor, in the variations you present, to the loading or unloading operations. Although Federal law hazardous material transportation law defines "transportation" to include "the movement of property and loading, unloading, or storage incidental to the movement," 49 U.S.C. § 5102(12), I have not been able to envision a situation when the HMR would apply to the loading or unloading of a vehicle when our regulations would not apply to the vehicle during its movement from the point of loading to the point of unloading.

This opinion is a tentative one, because RSPA is presently conducting a rulemaking to better define the applicability of the HMR to these incidental loading, unloading, and storage activities. See the notices in our Docket No. HM-223 published in the Federal Register on July 26, 1996 (61 Fed. Reg. 39522), September 23, 1996 (62 Fed. Reg. 49723), October 11, 1996 (61 Fed. Reg. 53481), April 27, 1999 (64 Fed. Reg. 22718), and July 28, 1999 (64 Fed. Reg. 40810). It is possible that other scenarios may be raised where RSPA might find that the activities of a contractor's employee, in loading or unloading a vehicle, would be governed by the requirements of the HMR, even though those requirements would not apply when the vehicle was being driven by a government employee.

I am reluctant to express an opinion on whether the streets and sidewalks within the University campus are public or private property. This issue appears to be moot, because you state that only

University employees (rather than contractor personnel) drive vehicles transporting hazardous waste. When the transportation of hazardous materials is performed by government personnel for a governmental purpose, the location (public or private property) is not relevant. If this issue is not moot, it would appear to depend on intricate, fact-specific situations about which the University may wish to present opposing arguments. In that circumstance, it would be more appropriate for a court or fact-finding administrative agency to resolve this issue.

As I stated in my earlier letter, my responses address only the applicability of the requirements in the HMR and not the possible applicability of Colorado law or regulations similar to the HMR. During 1996 and 1997, the HMR applied to the transportation of hazardous waste, hazardous substances, and flammable cryogenic liquids in portable tanks and cargo tanks by all motor carriers (both interstate and intrastate). However, until October 1, 1998, the HMR did not apply to other hazardous materials when transported by intrastate motor carriers. See RSPA's final rules published in the Federal Register on January 8, 1997 (62 Fed. Reg. 1208, 1215), and September 22, 1997 (62 Fed. Reg. 49560, 49566).

I hope that this guidance is helpful. If you need further clarification, you may contact me at the above address.

Sincerely,



Edward H. Bonekemper, III
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Hazardous Material Safety and
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cc: Mr. Dave W. Wergin
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